

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRIAN D'AMATO and PAUL D'AMATO,
as partners of SIBRO I, SISBRO
II, and SISBRO III,

Plaintiffs,

v.

REGINA LILLIE and GERALD LILLIE,
as partners of SISBRO I, SISBRO
II, and SISBRO III,

Defendants.

NO. CV-06-0314-EFS

**ORDER DENYING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT DETERMINING
CLAIMS BARRED BY THE DOCTRINE OF
LACHES AND STATUTE OF
LIMITATIONS**

Before the Court, without oral argument, is Defendants Gerald and Regina Lillie's Motion for Summary Judgment Determining Claims Barred by the Doctrine of Laches and Statute of Limitations. (Ct. Rec. 106.) Plaintiffs oppose the motion, contending there are genuine issues of material fact that preclude summary judgment. After reviewing the submitted material and relevant authority, the Court is fully informed and denies Defendants' motion.

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1 **A. Statement of Facts**¹

2 1. Sisbro I

3 In 1981, Anthony D'Amato² recommended to Gerald and Regina Lillie
4 that they establish a SuperCuts hair cutting salon business (hereinafter
5 referred to as "salon"). (Ct. Rec. 185 ¶ 1.) At that time, the Lillies
6 resided in California and worked full-time for United Airlines Lines
7 (UAL). *Id.* ¶¶ 2 & 3. On December 19, 1981, Anthony D'Amato followed up
8 on his recommendation with a letter recommending forming a limited
9 partnership for the establishment of a single salon and included a draft
10 partnership agreement. *Id.* ¶ 5.

11 In March 1982, the Sisbro Limited Partnership ("Sisbro I") was
12 formed. *Id.* ¶ 7. The Sisbro I partners were Gerald and Regina Lillie
13 (holding a 65% ownership interest), Dennis and Gale Lillie (holding a
14 10% interest), Robert and Norma Kraus (holding a 5% interest), and PB
15 Investment Co. (holding a 20% interest). *Id.* ¶ 8. Gerald and Regina
16 Lillie are the general partners.

17 On or about April 1, 1982, Sisbro I opened a SuperCuts salon in
18 _____

19 ¹ In ruling on this motion for summary judgment, the Court
20 considered the facts and all reasonable inferences therefrom as
21 contained in the submitted affidavits, declarations, exhibits,
22 depositions, and the parties' Joint Statement of Uncontroverted Facts
23 (Ct. Rec. 185) in the light most favorable to Plaintiffs, the party
24 opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654,
25 655 (1972) (*per curiam*). The following factual recitation was created
26 utilizing this standard.

27 ² Anthony D'Amato is Regina Lillie's brother and the father of
28 Paul and Brian D'Amato. (Ct. Rec. 185 ¶ 4.)
ORDER -- 2

1 Spokane, Washington. *Id.* ¶ 20. Sisbro I paid Dennis Lillie \$8,065.00 to
2 manage the Spokane SuperCuts; his pay was based on the amount of hours
3 that he worked.

4 2. PB Investment Co.

5 PB Investment Co. was comprised of then-minors Paul and Brian
6 D'Amato and their mother, Barbara D'Amato. *Id.* ¶ 9. Anthony D'Amato
7 monitored the investments to see how they were doing and made decisions
8 pertaining to PB Investment Co. with his wife Barbara's approval. *Id.*
9 ¶¶ 10 & 11.

10 PB Investment Co. ceased in approximately 1992, with the assets
11 being transferred to Paul and Brian D'Amato. *Id.* ¶¶ 15 & 16. Before
12 dissolution, neither Paul nor Brian D'Amato were part of the
13 negotiations or investment discussions related to PB Investment Co. and
14 had nothing to do with the organization or start up of Sisbro. *Id.* ¶¶
15 12 & 13. In fact, it was not until approximately 1991 that Paul D'Amato
16 become knowledgeable about Sisbro; at this time, Paul D'Amato neither
17 asked nor received PB Investment Co. or Sisbro financial statements. *Id.*
18 ¶¶ 14 & 17. Likewise, Brian D'Amato never received any financial
19 statements or tax returns regarding PB Investment Co. *Id.* ¶ 18.

20 3. Sisbro II

21 Gerald and Regina Lillie proposed forming a second limited
22 partnership called Sisbro II and to open a second salon. *Id.* ¶ 22.
23 Sisbro II was formed in December of 1983, with the partner and ownership
24 interests in Sisbro II mirroring that of Sisbro I. *Id.* ¶¶ 25 & 26.
25 However, following Dennis Lillie's death in March 1994, Gale Lillie sold
26 her Sisbro I and Sisbro II shares back to the partnerships by signing a
27

1 sale agreement dated May 14, 1984.³ *Id.* ¶¶ 27 & 35. Revised Articles
2 of Limited Partnership and revised Certificates of Limited Partnership
3 reflecting the ownership change for Sisbro I and Sisbro II were signed
4 by the partners.⁴ *Id.* ¶ 36. The new partnership ownership interests were
5 allocated as follows: Gerald and Regina Lillie at 72%; Robert and Norma
6 Kraus at 6%; and PB Investment Co. at 22%. *Id.* ¶ 38. The business of
7 Sisbro I and Sisbro II, i.e. "the management, maintenance, and operation
8 of a hair cutting salon," remained unchanged. *Id.* ¶ 40.

9 3. Sisbro I and II Operations

10 Following Dennis Lillie's death in March 1984, Gerald and Regina
11 Lillie took over Sisbro I and II management and operation duties, and
12 Cathy Nelson took over the bookkeeping duties, previously performed by
13 Dennis Lillie. In approximately April 1984, in order to devote more
14 time to Sisbro, Gerald and Regina Lillie rented an apartment in Spokane;
15 Regina Lillie stopped working for UAL⁵; and Gerald Lillie shifted from
16 full-time to part-time status with UAL. *Id.* ¶¶ 30 & 31.

17 On or about April 1, 1984, Sisbro II, with Gerald and Regina Lillie
18 as general partners, opened a salon in Spokane. *Id.* ¶¶ 32 & 39. On or
19 about April 1, 1986, Sisbro I opened a second salon. *Id.* ¶ 41. Then, on
20 or about November 11, 1989, Sisbro II opened a second salon. *Id.* ¶ 42.

21 ///

22 ³ Anthony D'Amato signed the sale agreement on behalf of PB
23 Investment Co. *Id.* ¶ 35.

24 ⁴ Barbara D'Amato signed each of the foregoing documents on
25 behalf of PB Investment Co. *Id.* ¶ 37.

26 ⁵ At this time, Regina Lillie was the subject of a misconduct
27 investigation at UAL.

4. Sisbro III

In 1991, Gerald and Regina Lillie determined that opening a salon in north Idaho would be beneficial. *Id.* ¶ 43. Regina Lillie discussed this with Anthony D'Amato, who advised her that an Idaho limited partnership should be formed using the same format as used by Sisbro I and Sisbro II. *Id.* ¶ 44.

The Sisbro III Limited Partnership ("Sisbro III") was formed by a Partnership Agreement dated October 2, 1991. *Id.* ¶ 45. The partnership ownership interest mirrored Sisbros I and II (Gerald and Regina Lillie at 72%, Robert and Norma Kraus at 6%, and PB Investment Co. at 22%). *Id.* However, unlike Sisbro I and II, Gerald Lillie was the only managing general partner of Sisbro III. *Id.* ¶ 47.

On or about November 4, 1991, Sisbro III opened a salon in Coeur d'Alene, Idaho. (Ct. Rec. 185 ¶ 48.)

The Articles of Limited Partnership for Sisbro I and Sisbro II did not prevent Gerald and Regina Lillie from operating salons outside of Washington. *Id.* ¶ 53. If they had known that Paragraphs 10 of the Sisbro partnership agreements limited their total compensation to \$300.00 per week regardless of the number of salons they operated, they would have expanded into the Idaho market without limited partners. *Id.* ¶ 54.

5. Sisbro Operations

From November 1995 through March 2002, Sisbro I opened five (5) additional salons, and closed the original salon. *Id.* ¶ 52. From February 1995 through October 2001, Sisbro II opened seven (7) additional salons. *Id.* ¶ 55. From April 1999 through January 2002, Sisbro III opened four (4) additional salons. *Id.* ¶ 56. There are

1 currently nineteen (19) salons - operating either under the Supercuts
2 or Cost Cutters name - owned by the three Sisbro partnerships and
3 operating under one of the Sisbro I, II, or III limited partnerships.
4 *Id.* ¶¶ 57, 58, 59.

5 On or about October 1, 2002, Gerald Lillie quit his job at UAL and
6 took early retirement in order to devote all his time to operating and
7 managing the partnerships and the salons. *Id.* ¶ 49.

8 6. Documentation

9 The parties dispute whether Gerald Lillie mailed financial
10 documents to PB Investment Co. prior to its dissolution and then to Paul
11 and Brian D'Amato between 1992 and 1999. *Id.* ¶ 83. Regardless, the
12 parties agree that K-1s, a tax form for individual partners, were
13 received by PB Investment Co. and subsequently by Paul and Brian
14 D'Amato. *Id.* ¶ 61. Any documentation received by Anthony D'Amato on
15 behalf of PB Investment Co. would have been disposed of, and he admits
16 not opening or reviewing half the mail he receives. *Id.* ¶¶ 81 & 82.
17 Paul and Brian D'Amato did not look at the Sisbro material received
18 before providing the K-1s to their accountant. *Id.* ¶ 61, 71, & 74.
19 Brian D'Amato has never asked for information about Sisbro, *id.* ¶ 72;
20 Paul D'Amato may have requested a copy of a tax return, *id.* ¶ 89. Norma
21 Kraus received financial documentation for the salons from time to time.
22 (Ct. Rec. 63: Kraus Decl. 1:24-25.)

23 Between 1991 and 2005, Paul D'Amato did not discuss the Sisbro
24 entities, including the compensation plan for Regina and Gerald Lillie,
25 with Anthony D'Amato, and did not make any effort to learn what it was.
26 (Ct. Rec. 185 ¶¶ 86 & 111.) Before this lawsuit, Brian D'Amato had
27 little understanding about who was managing the partnerships, or whether

1 the managers were being paid. *Id.* ¶ 116.

2 7. D'Amatos' Other Salon Interests

3 Anthony, Paul, and Brian D'Amato have had interests in
4 approximately eighty (80) salons over the past thirty (30) years. *Id.*
5 ¶ 91. As a result of their education and experience, Anthony and Paul
6 D'Amato understand the economics behind the salon business. *Id.* ¶ 90.

7 Paul D'Amato, who received a degree from the University of Illinois
8 in 1992 with a minor in business, started and operated SuperCuts and
9 Cost Cutters salons from 1991 until 2006. *Id.* ¶¶ 92 & 94. During this
10 time, he performed functions including site selection, store
11 performance, financial review, compensation, planning, and marketing.
12 *Id.* ¶ 95. His education helped him prepare and evaluate financial
13 statements for these businesses. *Id.* ¶¶ 93 & 96. He ultimately sold
14 the SuperCuts and Cost Cutters assets he managed, consisting of forty-
15 three (43) salons, to Regis in 2006. *Id.* ¶ 97. Paul also receives
16 financial statements from Cara Kugelard for an entity that operates
17 salons in which he holds a financial interest; yet, he does not review
18 these financial statements. *Id.* ¶¶ 98 & 99. He also does not review the
19 periodic financial statements that he receives for Rainbow Group, Inc.,
20 another business he has an interest in. *Id.* ¶¶ 100 & 101.

21 8. Dispute

22 Plaintiffs allege that Gerald and Regina Lillie (1) breached the
23 partnership agreements by accepting salaries greater than provided by
24 the partnership agreements thereby reducing partnership profits and (2)
25 breached fiduciary duties by accepting salaries greater than provided
26 by the partnership agreements, by not providing tax returns and
27 financial statements, and by not repaying withheld profits. *Id.* ¶¶ 119

1 & 120. The Court concluded that the jury is to determine what the
2 parties intended in Paragraphs 10 of the Sisbro partnership agreements:

3 10. Salary of General Partners. The general partners shall
4 be entitled to a salary of SEVEN DOLLARS AND 50/100 CENTS
5 (\$7.50) per hour for time actually spent in the supervision
6 and/or operation of the business, which salary shall not
7 exceed THREE HUNDRED AND NO/100 DOLLARS (\$300.00) per week.
8 Salaries shall be paid monthly. In addition the general
partners shall be entitled to reimbursement for all necessary
out-of-pocket expenses incurred in conducting the business of
the partnership. The time spent in attending training
classes to learn the operation of the business shall not be
included as salaried time.

9 (Ct. Recs 70 & 246 (Sisbro I and II partnership agreements ¶ 10; Sisbro
10 III partnership agreement ¶ 10 varies slightly)). Although Plaintiffs
11 contend the Lillies breached Paragraphs 10 and that the maximum annual
12 amount the Lillies are entitled to is \$15,600.00, based upon a 40-hour
13 work week for 52 weeks a year, neither Paul nor Brian D'Amato know
14 whether the Lillies thought they were being paid more money than they
15 should have been paid. *Id.* ¶¶ 102, 103, 117.

16 Anthony D'Amato believed that Gerald and Regina Lillie had only
17 \$5,000.00 to \$10,000.00 to invest in 1981. *Id.* ¶ 104. In approximately
18 1995, Anthony D'Amato believed that Gerald and Regina Lillie
19 substantially renovated a recently-purchased mansion, and that Gerald
20 Lillie purchased an apartment. *Id.* ¶ 107. From 1981 to 1997, Anthony
21 D'Amato and Regina Lillie discussed the affairs, plans, and strategies
22 of the Sisbro business through telephone conversations and personal
23 meetings. *Id.* ¶ 89.

24 In 1997, Anthony D'Amato stopped speaking with Regina Lillie. *Id.*
25 ¶ 108. He claims that, in the conversation that terminated their
26 relationship, he asked Regina Lillie about the company's low bottom
27 line. *Id.* ¶ 109. Regina Lillie allegedly responded, "I don't need to

1 tell you that kind of information." *Id.* Anthony D'Amato also claims
2 that she told him that she did not have to justify her business skills
3 or methods to him. *Id.*

4 **B. Summary Judgment Standard**

5 Summary judgment is appropriate if the "pleadings, depositions,
6 answers to interrogatories, and admissions on file, together with the
7 affidavits, if any, show that there is no genuine issue as to any
8 material fact and that the moving party is entitled to judgment as a
9 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for
10 summary judgment, the opposing party must point to specific facts
11 establishing that there is a genuine issue for trial. *Celotex Corp. v.*
12 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make
13 such a showing for any of the elements essential to its case for which
14 it bears the burden of proof, the trial court should grant the summary
15 judgment motion. *Id.* at 322. "When the moving party has carried its
16 burden of [showing that it is entitled to judgment as a matter of law],
17 its opponent must do more than show that there is some metaphysical
18 doubt as to material facts. In the language of [Rule 56], the nonmoving
19 party must come forward with 'specific facts showing that there is a
20 genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio*
21 *Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in
22 original opinion).

23 When considering a motion for summary judgment, a court should not
24 weigh the evidence or assess credibility; instead, "the evidence of the
25 non-movant is to be believed, and all justifiable inferences are to be
26 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
27 (1986). This does not mean that a court will accept as true assertions

1 made by the non-moving party that are flatly contradicted by the record.
2 *See Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

3 **C. Legal Authority and Analysis**

4 Defendants argue that Plaintiffs' claims are barred by the doctrine
5 of laches; in the alternative, Defendants maintain that Plaintiffs'
6 claims should be limited by the applicable statute of limitations.

7 1. Laches

8 Laches - a fact-dependent equitable remedy that bars untimely
9 claims - is an "extraordinary remedy to prevent injustice and hardship
10" *Barber v. Barber*, 106 Wn. App. 390, 397 (2001); *Brown v.*
11 *Continental Can Co.*, 765 F.2d 810, 814 (9th Cir. 1985). Laches applies
12 if (1) the claimant had knowledge of the facts constituting the cause
13 of action, or a reasonable opportunity to discover such facts, (2) the
14 claimant then unreasonably delayed in commencing the action, and (3)
15 defendant was damaged by the delay. *Barber*, 106 Wn. App. at 397.

16 Viewing the evidence in Plaintiffs' favor, the Court concludes
17 there are genuine issues of material fact as to whether Plaintiffs
18 unreasonably delayed in filing the lawsuit. First, the Court finds
19 genuine issues of material fact exist as to whether PB Investment Co.
20 or Brian and Paul D'Amato received financial statements evincing the
21 "guaranteed payments" as payments to the Lillies for their managing
22 services, rather than payments for the use of their capital. See Klig
23 and Sloan, 712-2nd T.M., *Partnerships - Taxable Income; Allocation of*
24 *Distribute Shares; Capital Accounts*, at A-107 - A-112. Gerald Lillie
25 contends that he mailed financial statements to the partners following
26 the end of each quarter and at the end of each year from 1982 to 1999.
27 (Ct. Rec. 109: Gerald Lillie Decl. ¶ 3.) This statement is supported

1 by Norma Kraus. However, neither Anthony, Brian, nor Paul D'Amato
2 remember receiving financial statements and they contend the K-1s fail
3 to evince that the "guaranteed payments" were payments for the Lillies'
4 managing services. The jury will need to assess the credibility of the
5 witnesses and resolve when a reasonable person would have known, or have
6 reason to know, the facts supporting Plaintiffs' causes of action.

7 Defendants rely on the fact that Anthony and Barbara D'Amato had
8 a conversation with Allen Sager, another individual who holds interests
9 in SuperCuts franchises, in 1992. This conversation involved a
10 discussion that the profits in the SuperCuts franchises managed by the
11 Lillies were not as high as they should be. However, there is no
12 evidence that either Anthony or Barbara D'Amato shared this conversation
13 or their concerns with their sons before this lawsuit. (Ct. Rec. Ex.
14 F: Paul D'Amato Dep. 95:6-8.)

15 Accordingly, the Court determines genuine issues of material fact
16 exist as to whether Plaintiffs unreasonably delayed in bringing this
17 lawsuit after learning, or reasonably should have known of, the facts
18 constituting their breach of contract and breach of fiduciary duty
19 claims. Likewise, genuine issues of material fact exist as to whether
20 Defendants, who left their positions at UAL and were not required to
21 open up the Idaho salons with these same partners, were injured by this
22 claimed delay. Defendants' motion is denied in part.

23 2. Statute of Limitations and Diversion of Profits

24 a. *RICO claims*

25 Following the filing of Defendants' motion, the parties agreed to
26 dismiss Plaintiffs' RICO claims. (Ct. Recs. 174 & 179.) Accordingly,
27 Defendants' motion to limit Plaintiffs' RICO claims is denied as moot.

b. *Breach of Fiduciary Duty*

Plaintiffs' breach of fiduciary duty cause of action is subject to a three-year statute of limitations in Washington, RCW 4.16.080(2)⁶, and a four-year statute of limitations in Idaho, Idaho Code 5-224⁷. In Washington, an action to recover an overpayment of profits is governed by the three-year statute of limitations imposed by RCW 4.16.080(2)⁸; while in Idaho, a diversion of profits claim is subject to a four-year statute of limitations, Idaho Code 5-224. The Washington statute of limitations begin to accrue when a reasonable person knew, or should have known of, the facts supporting the cause of action. *Hudson v. Condon*, 101 Wn. App. 866, 973 (2000); *First Md. Leasecorp v. Rothstein*, 72 Wn. App. 278, 286 (1993); 136 A.L.R. 658. The Idaho statute of limitations begins to accrue when the first act of negligence occurred and when Plaintiffs first suffered damage. See *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 614 (1994). As set forth above, the Court finds genuine issues of material fact exist as to when Plaintiffs knew, or reasonably should have known of, the basis for their Washington causes of action. In addition, the jury must determine when Brian and Paul D'Amato first suffered damage as a result of Gerald and Lillie's negligence, if any. Accordingly, Defendants' motion is denied in part.

D. Conclusion

For the above-given reasons, **IT IS HEREBY ORDERED:** Defendants'

⁶ *Hudson v. Condon*, 101 Wn. App. 866, 873 (2000).

⁷ *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 614 (1994).

⁸ *Halver v. Welle*, 44 Wn.2d 288, 295 (1954).

1 Motion for Summary Judgment Determining Claims Barred by the Doctrine
2 of Laches and Statute of Limitations (**Ct. Rec. 106**) is **DENIED**.

3 **IT IS SO ORDERED:** The District Court Executive shall enter this
4 Order and forward copies to counsel.

5 DATED this 29th day of May 2008.

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8 S/ Edward F. Shea
EDWARD F. SHEA
9 UNITED STATES DISTRICT JUDGE

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